IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI.

SECOND APPEAL NO. 56 OF 2000.

1. Mr. Porbuko Uma Mandrekar,

2. Mr. Nyaheshwar Uma Mandrekar,

3. Mr. Chandra Uma Mandrekar,
   all major of age,
   all residents of House No. 7,
   Tintowaddo, Reis Magos,
   Nerul, Bardez, Goa. .....Appellants/Defendants.

versus

1. Mr. Wencesslay Alex D'Silva,
   Major, married, landlord,
   resident of Fortavaddo,
   Nerul, Bardez, Goa.

2. Mr. Prashant Gokuldas Mandrekar,

3. Mrs. Lalan Gokuldas Mandrekar. ..... Respondents.

Shri S. D. Lotlikar, Senior Advocate with Ms. Kamaxi Sambari, Advocate for the Appellants.

Shri A. F. Diniz, Advocate for the Respondent No. 1.

Appeal stands dismissed as against Respondents No. 2 & 3 as per the order of this Court dated 13.11.03.

CORAM : N. A. BRITTO, J.

DATE : 29th October, 2004 &
4th November, 2004.

ORAL JUDGMENT (PER BRITTO, J.) :

1. This is a defendants' Second Appeal, arising from Regular Civil Suit No. 203/88.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

3. By order of this Court dated 19.01.01, this Second Appeal was admitted on two substantial questions of law which read as follows :

> Where in view of the specific plea raised by the appellants (defendants), to the effect that they were tenants / deemed purchasers of the suit property, by virtue of the provisions of the Agricultural Tenancy Act, 1964, the Courts below could have proceeded with the suit and recorded a finding on the issue of tenancy?
>
> Whether in view of the specific plea raised by the appellants (defendants), that they were tenants / deemed purchasers under the Agricultural Tenancy Act, 1964, in respect of the suit property, it was obligatory on the Courts below, to have stayed the suit and directed the appellants to obtain a declaration tenancy rights in respect of the suit property?

4. To get a hang of the controversy, it may be stated, that the plaintiff had filed the said Civil Suit, inter alia, to declare that the construction of three huts, namely, “H-1”, “H-2” and “H-3” and the extension to existing structures namely extension “E-1” and “E-2” done by the defendants were illegal and the defendants be directed to

demolish the same and restore the suit property to its original condition. The plaintiff had also prayed for a declaration that the re-construction of “Tulas” on the boundary line of the suit property was illegal and a decree be passed directing the defendants to remove the Tulas from the boundary line and re-construct the same if the defendants so required so as to keep a gap of 1.80 meters between the Tulas and boundary line and also for a declaration that the defendants had no right to construct the barbed wire fencing and the defendants be directed to demolish the barbed wire fencing forthwith and restore the property to its original condition.

5. The property known as “Santerichem Bhat” and surveyed under No. 2/1, admeasuring 6350 sq.mts. belonged to Blanche Bertha Amariles Francisco e Mendonca and her husband Shri Jovito Joao Mendonca. The same was divided into three plots and one plot admeasuring 2718 sq.mts., was purchased by the plaintiff by Deed of Sale dated 6.9.1972. In this portion there was a house of one Uma Bablo Mandrekar, the deceased father of the defendants, who was declared as Mundkar. It was the case of the plaintiff that as mundkar, the said Uma Bablo Mandrekar was entitled to purchase 5 meters all around his house or 300 sq.mts. which ever is more to be fixed by the Mamlatdar and besides there were two structures at the back and at the side of the said house of the defendant and in front of the house there was the said Tulas exactly at a distance of 1.80 mts. from the eastern boundary line of the suit property of the plaintiff.

6. The plaintiff claimed that in the year 1984, the said Uma Bablo Mandrekar demolished the existing Tulas and re-constructed the same towards the boundary line thereby occupying a space of 1.80 mts. as a result of which no space was left between the boundary line and the said Tulas as it existed originally and the said Tulas was constructed without obtaining proper licence and it also blocked the plaintiff's access to the remaining portion of his property from the main public road and that in the same year, the said Uma Bablo Mandrekar put a fence of bamboos and barbed wires which closed the plaintiff's access to the other portion of his property and then the said Uma Bablo Mandrekar started stacking hay or dry grass in the property of the plaintiff thereby encroaching nearly 200 sq.mts. of his property. The plaintiff stated that on the death of Uma Bablo Mandrekar, the defendants became entitled to all the rights and claims of the said Uma Bablo Mandrekar but without any rhyme or reason again adopted hostile attitude towards the plaintiff and started harassing the plaintiff in different ways and in the year 1987 the defendants constructed three huts at a distance of about 5 meters from the outer border line of the defendants house without consent of the plaintiff and licence of the Panchayat and in January, 1987, the defendants demolished and re-constructed the said Tulas at the boundary line thereby keeping no space of 1.80 mts. between the boundary line and the original Tulas as it existed then and at this time the defendants also encroached upon more land on the western and northern side of his house and thereby extended the existing

structure by 4.5 mts. x 2.5 mts. at the back of the house on the western side and by 8.25 mts. x 2.40 mts. extended the existing struture on the northern side of the house without the consent of the plaintiff.

7. The plaintiff, therefore claimed that the defendants had no right, title or interest to do the extensions which they showed on the plan as E-1 & E-2 and the three huts which they identified as H-1, H-2 and H-3 and therefore filed the suit for reliefs as stated herein above.

8. The defendants contested the suit and, inter alia, stated that : “The Court had no jurisdiction to try the suit in respect of the suit property protected under the Goa Daman and Diu Agricultural Tenancy Act, 1964 (the Act, for short) and more particularly by virtue of the 5th Amendment of the Act”. The defendants also stated that the prayers of the plaintiff were time barred. The defendants also stated that the Court had no jurisdiction because their father was already registered as Mundkar in respect of the main house and the alleged encroachments are falling within the Mundkar rights of the defendant and / or they were entitled to the same as easementary rights and therefore the reliefs claimed by the plaintiff were not available to him in view of the relevant provisions of the Goa Daman and Diu Mundkars (Protection from Eviction) Act, 1975.

9. The defendant also pleaded that the suit property including other two properties were leased to their father, the said Uma Bablo Naik by late Manuel Francisco, the father of the said Blanche and father-in-law of the said Jovito Mendonca who sold the suit property to the plaintiff. The defendants stated that the lease was granted in favour of Uma Bablo Naik by agreement dated 28.11.51, along with two other properties situated at Nerul and that even after the lease was granted, the said Manuel Francisco even agreed to sell part of the suit property to the deceased Uma Bablo Naik and even executed a writing to that effect on 19.10.53. The defendants stated that the said lease agreement dated 28.11.51 or agreement for sale dated 19.10.53 have not been terminated and the said writings continue to be valid. The defendants also stated that the said property was divided upon the death of the said Manuel Francisco without the consent and permission of the deceased Uma or the defendants or the other heirs of the deceased Uma and sold in three plots to three different purchasers. The defendants stated that they were in possession and enjoyment of the suit property even to the exclusion of the plaintiff and his wife who were the owners of the same. The defendants stated that there are not many trees in the said property and the trees are scarcely spread in the same. The defendants stated that they were in enjoyment and possession of the suit property and have become deemed owners of the same by virtue of the 5th Amendment of the Goa Daman and Diu Agricultural Act, 1964 and besides the said Uma was registered as Mundkar in the suit property

and as such he has also acquired rights appurtenant thereto. The defendants also stated that they have acquired permanent rights in relation to the entire property by virtue of the Act and the Mundkar's Act, 1975.

10. The Learned Trial Court frames several issues including isuue No. 4 which reads as follows :

> " Whether the defendants proved that this Court had no jurisdiction in view of the Agricultural Tenancy Act, or in view of the Mundkar Act".

The Learned Trial Court proceeded to answer the said issue in the negative and in answering the said issue the Learned Trial Court came to the conclusion that the defendants had not obtained any declaration to prove their tenancy rights and that the survey records also did not show that the defendants were cultivating or enjoying the suit property as tenants. The Learned Trial Court further opined that considering these factors, the defendants had failed to prove that they were tenants in respect of the suit property and as such there was no bar of jurisdiction.

11. The Learned First Appellate Court observed that " the mere fact that the appellants took the stand that they were the tenants of the suit property, the issue is (not?) necessarily to be referred to the Mamlatdar." The Learned First Appellate Court further observed that " the records prima facie to show that the appellants are the tenants"

and that neither the lease agreement executed in 1951 nor the survey records showed that the appellants (defendants) were the tenants of the suit property and moreover the suit was for demolishing of the illegal structures and the encroachment and the appellants failed to prove that they were in possession and enjoyment of the suit property." The Learned First Appellate Court therefore confirmed the findings on issue No. 4 given by the Learned Trial Court.

12. Upon the death of defendant No. 1, his son and daughter-in-law were brought on record. The First Appeal was filed by all the defendants.

13. This Second Appeal was filed by the defendants No. 2, 3 & 4 and the son and daughter-in-law of the deceased defendant No. 1 Gokuldas Uma Mandrekar were joined as respondents No. 2 & 3. The appellants / defendants No. 2, 3 & 4 took considerable time to effect service on the said son and daughter-in-law of Gokuldas Uma Mandrekar namely respondents No. 2 & 3 herein as a result of which on 17.02.04 it was ordered by this Court that in case no steps are taken by the appellants / defendants No. 2 to 4, the appeal against them would stand dismissed as per order dated 13.11.03 and consequently the appeal was dismissed on or about 20.02.04 against the said respondents No. 2 & 3.

14. In the situation mentioned above, an objection has been taken by Shri Diniz, the Learned Counsel of the plaintiff by submitting that the decree against respondents No. 2 & 3 has attained finality and cannot be set aside in the guise of using the powers under Order 41, Rule 4 of the C.P.C. which would tantamount to reviewing the earlier order of this Court which is otherwise impermissible. Shri Diniz has submitted that the said decree being joint against all the defendants and having attained finality, the entire appeal has got to be rejected as otherwise there will be inconsistent decrees. Shri Diniz has placed reliance on a number of cases to which reference will be made little later.

15. On the other hand, Shri Lotlikar, the Learned Counsel of the defendants/appellants has submitted that the decree can be set aside also against non-appealing defendants who were respondents No. 2 & 3 before this Court. Shri Lotlikar has placed reliance on the provisions of Order 41, Rule 4, and also on several decided cases, which I will refer, next.

16. To consider the objection, only the provisions of Rule 4, Order 41 of the C.P.C. are relevant. We are not at all concerned with the provisions of Rule 4, Order 22 of the C.P.C. which deal with the procedure in case of death of one of several defendants or of sole defendant.

17. Rule 4, Order 41 states that :

> " Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

18. In the case of **Rameshwar Prasad and others** v/s **Shambehari Lal Jagannath and another** (AIR 1963 SC 1901), the Supreme Court stated that :

> " The principle behind the provisions of Rule 4 of Order 41, CPC, seems to be that any one of the plaintiffs or defendants, in filing an appeal as contemplated by the rule, represents all the other non-appealing plaintiffs or defendants as he wants the reversal or modification of the decree in favour of them as well, in view of the fact that the original decree proceeded on a ground common to all of them. Where a number of persons have filed an appeal and pending the appeal one of the appellants dies, the surviving appellants cannot be said to have filed the appeal as representing the deceased appellant."

The Supreme Court also stated that :

> " The provisions of Order 41, Rule 4 do not over-ride the provisions of Order 22, Rule 9, CPC. Such a question cannot arise. The two deal with different stages of the appeal and provide for different contingencies. Rule 4 of Order 41 applies to the stage when an appeal is filed and empowers one of the plaintiffs or defendants to file an appeal against

> the entire decree in certain circumstances. He can take advantage of this provision, but he may not. Once an appeal has been filed by all the appellants, the provisions of Order 41, Rule 4 became unavailable. Order 22 operates during the pendency of an appeal and not at its institution. If some party dies during the pendency of the appeal, his legal representatives have to be brought on the record within the period of limitation. If that is not done, the appeal by the deceased appellant abates and does not proceed any further. There is thus no inconsistency between the provisions of Rule 9 of Order 22 and those of Rule 4 of Order 41, CPC. They operate at different stages and provide for different contingencies. There is nothing common in their provisions which make the provisions of one interfere in any way with those of the other."

19. In the case of **Sri Chand and others** v/s **M/s. Jagdish Pershad Kishan Chand and others** (AIR 1966 SC 1427), the Supreme Court stated that :

> " An appellate Court has no power to proceed with an appeal and to reverse and vary the decree in favour of all the plaintiffs or defendants under Order 41, Rule 4 when the decree proceeds on a ground common to all the plaintiffs or defendants, if all the plaintiffs or the defendants appeal from the decree and any of them dies and the appeal abates so far as he is concerned."

20. In the case of **Bibijan and others** v/s **Murlidhar and others,** (1995) 1 SCC 187, the appellant No. 1 had died in July 1984 and appellant No. 5 had died in the year 1987 and it was reported that respondent No. 1 died in the year 1983 and substitution was allowed. In this situation, the Supreme Court observed that :

“ Admittedly, no steps were taken to bring the legal representatives of appellants 1 and 5 on record. By By operation of Order 22, Rule 4 read with Rule 11 of Civil Procedure Code, when one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. Rule 11 postulates the applicability of this order to appeals. As far as may be the word 'plaintiff' should be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal. Thus at the appellate stage also the legal representatives of the deceased respective appellants and the respondents should be substituted as the legal representatives of the respective appellants / respondents. Article 120 of the third division of the Schedule to the Limitation Act, 1963 provides 90 days from the date of death as the period of limitation to have the legal representatives of the plaintiff - appellant, defendant--respondent, as the case may be, to be brought on record. After the expiry of 90 days, the appeal stands abated unless the appeal survives against the surviving appellants. Within 60 days after the expiry of 90 days, under Article 121, the abatement needs to be set aside. Since, admittedly, no applications had been made to bring on record the legal representatives of the deceased appellants 1 and 5 from the respective dates, before the expiry of 90 days, their appeal stood abated. The question is whether the appeal of

> other appellants also abates. It is the joint and inseverable decree of redemption granted in favour of respondents, which was questioned in the appeal. When that decree of redemption against appellants 1 and 5 had come to stand because of abatement of their appeal, that decree of redemption against appellants 2 to 4 alone cannot be set aside, for in that event decree of redemption made against appellants 1 and 5 questioned in the appeal would stand while the decree against appellants 2 to 4 alone calls to be set aside. Since the decree for redemption being joint and inseverable, the appeal cannot be continued and in this view of the matter, the entire appeal stood abated."

21. The plaintiff has also relied on a decision of a Division Bench of this Court in the case of **Sheela wd/o Vijay Choudhari and others** v/s **Central Bank of India and others** (1999 Bank Journal 274). In that case the suit was filed by the Bank against M/s. Vijay Industry through its proprietor Mr. Vijay W. Choudhari and two guarantors. During the pendency of the suit, the proprietor Mr. Vijay W. Choudhari died and his mother, widow and children were brought on record as defendants No. 2(a) to 2(d) and they filed a joint written statement. The suit was decreed ultimately and the defendants No. 2 (b) to 2(d) filed an appeal and during the pendency of the said appeal, the name of defendant No. 2(a)/respondent No. 2 in the said appeal came to be deleted and the plaintiff bank/respondent No. 1 in the appeal sought for a declaration that the appeal did not survive as it had abated against all the present respondents because of the

deletion of the name of respondent No. 2/original defendant No. 2(a).

22. The division bench considered a number of cases, but after relying on the case of **Bakshish Singh (dead) by L.Rs.** v/s **Arjan Singh and others** (1996) 8 SCC 323, came to the conclusion that the decree passed by the Trial Court was joint and inseverable / indivisible and the original defendant Nos. 2(a) to 2(d) had come on record as the legal representatives of the original defendant No. 2 on his demise. The Division Bench, further observed that as an effect of deletion of the name of respondent No. 2 from the present appeal, it is true that decree passed by the Trial Court, which is impugned in the present appeal, has become final against deleted respondent, namely defendant No. 2(a) and if the present appeal ultimately comes to be allowed then two different decrees will be in the field. Such a situation is against the law enunciated by the Supreme Court in the case of **State of Punjab** v/s **NathuRam** (AIR 1962 SC 89) onwards. The Court further observed that this Court in the above referred unreported cases, had laid down that the appeal is abated if the decree has become final against one of the defendants. The Court further observed that the action of the appellants to delete the name of respondent No. 2 had proved to be fatal to their appeal. As the Decree passed by the Trial Court is joint and indivisible and as the decree has become final against the deleted respondent No. 2 in view of the law laid down by the Supreme Court and more particularly in the case of **Shri Bakshish Singh (dead) by L.Rs.** v/s **Arjan Singh**

and others (supra), the appeal was abated against all the respondents, and, therefore, it was dismissed as abated.

23. In the case of **Mahabir Prasad** v/s **Jage Ram and others** (AIR 1971 SC 742), the Supreme Court referred to the case of **Ratan La**l **Shah** v/s **Firm Lalmandas Chhadamma Lal** (AIR 1970 SC 108), wherein the plaintiffs had obtained a joint decree against two persons, Ratan Lal and Mohan Singh. Against the decree Ratan Lal had alone appealed to the High Court of Allahabad. Mohan Singh was impleaded as a party-respondent to the appeal and the notice of appeal sent to Mohan Singh was returned unserved, and no steps were taken to serve him with notice of the appeal. The High Court dismissed the appeal holding that there was a joint decree against Ratan Lal and Mohan Singh in a suit founded on a joint cause of action and the decree against Mohan Singh had become final. The appellant could not, on that account claim to be heard in his appeal, if he was heard and his claim was upheld. The High Court had observed that there would be two conflicting decisions between the same parties and in the same suit based on the same cause of action. The Supreme Court set aside the judgment of the High Court observing that even though Mohan Singh was not served with notice of appeal, the appeal filed by Ratan Lal was maintainable, in view of the provisions of Order 41, Rule 4, Code of Civil Procedure. The Court further observed that in Ratan Lal Shah's Case, AIR 1970 SC 108, it had allowed the appeal to be prosecuted, even though one of

the joint decree-holders impleaded as a party-respondent had not been served with the notice of the appeal. In the present case one of the respondents had died and his heirs were not brought on the record. In such a situation, the Supreme Court observed that :

> " No distinction in principle may be made between Ratan Lal Shah's case, AIR 1970 SC 108 and the present case."

The Supreme Court further observed that :

> " Competence of the appellate court to pass a decree appropriate to the nature of the dispute in an appeal filed by one of several persons against whom a decree is made on a ground which is common to him and others is not lost merely because of the person who was jointly interested in the claim has been made a party-respondent and on his death his heirs have not been brought on the record. Power of the appellate court under Order 41, Rule 4 to vary or modify the decree of a Subordinate Court arises when one of the persons out of many against whom a decree or an order had been made on a ground which was common to him and others has appealed. That power may be exercised when other persons who were parties to the proceeding before the subordinate court and against whom a decree proceeded on a ground which was common to to the appellant and to those other persons are either not impleaded as parties to the appeal or are impleaded as respondents. The Court therefore preceded to hold that the view held by the High Court could not therefore be sustained."

24. In the case of **Lal Chand (dead) by L.Rs. And others** v/s **Radha Kishan** (AIR 1977 SC 789), there was a joint eviction decree against several defendants and the Supreme Court held that an appeal by remaining defendants against whole decree was

maintainable, upon the death of one defendant. The Supreme Court observed that :

> " not only was it erroneous to treat the appeal as having abated on the death of B but the appellate Court ought to have applied the provisions of Order XLI, Rule 4, C.P.C. The eviction decree being joint and indivisible, the dismissal of the appeal in so far as B was concerned could not conceivably result in inconsistent decrees being passed in the event of the appeal by C and D being allowed."

25. In the case of **Chandramohan Ramchandra Patil and others** v/s **Bapu Koyappa Patil (dead) through L.Rs. and others,** (2003) 3 SCC 552, the Supreme Court observed that :

> " In a suit for partition, plaintiff and defendants are parties of equal status. If the right of partition has been recognized and upheld by the court, merely because only some of the plaintiffs had appealed and not all, the court was not powerless. It could invoke provisions of Order 41 of Rule 4 read with Order 41 of Rule 33 CPC. The object of Order 41 of Rule 4 is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The court in such an appeal may reverse or vary the decree in favour of all the parties who are in the same interest as the appellant. Order 41 Rule 4 of the Code enables reversal of the decree by the court in appeal at the instance of one or some of the plaintiffs appealing and it can do so in favour of even non-appealing plaintiffs. As a necessary consequence such reversal of the decree can be against the interest of the defendants vis-a-vis non-appealing plaintiffs. Order 41 Rule 4 has to be read with Order 41 Rule 33. Order 41 Rule 33 empowers the appellate court to do complete justice between the parties by passing such order or decree

> which ought to have been passed or made although not all the parties affected by the decree had appealed. Therefore, the appellate court by invoking Order 41 Rule 4 read with Order 41 Rule 33 of the Code could grant relief even to the non-appealing plaintiffs and make an adverse order against all the defendants and in favour of all the plaintiffs. In such a situation, it is not open to urge on behalf of the defendants that the decree of dismissal of suit passed by the trial court had become final inter se between the non-appealing plaintiffs and the defendants."

26. It may be noted that the Supreme Court in the aforesaid case of **Chandramohan Ramchandra Patil and others** v/s **Bapu Koyappa Patil (dead) through L.Rs. and others**, (2003) 3 SCC 552, relied upon the decisions referred to herein above namely **Mahabir Prasad** v/s **Jage Ram and others** (supra) as well as **Ratan Lal Shah** v/s **Firm Lalmandas Chhadamma Lal** (AIR 1970 SC 108).

DATE : 4th NOVEMBER, 2004.

27. As already stated, we are concerned in this appeal only with the provisions of Order 41, Rule 4, CPC and not concerned at all with the provisions of Order 22, Rule 4. Shri Diniz submits that the decree against the son and daughter-in-law of deceased defendant No. 1 has become final and in case this appeal is entertained there would be two conflicting decrees and therefore the appeal has got to be treated as abated. Shri Lotlikar, has sought to distinguish the decision of the Division Bench in the case of Sheela wd/o Vijay Choudhari and others v/s Central Bank of India and others (supra) submitting that it would

not apply to the facts of this case because the decree in that case was joint and several, but, in my opinion no such distinction could be made on that count alone. Shri Lotlikar next submits that in any event this case has got to be decided on the basis of the latest pronouncement of Supreme Court in the case of **Chandramohan Ramchandra Patil and others** v/s **Bapu Koyappa Patil (dead) through L.Rs. and others** (supra) which should prevail over all earlier pronouncements. In fact, the Supreme Court in the case of State of **Punjab** v/s **NathuRam (**AIR 1962 SC 89), on which reliance was placed by the Division Bench of this court, inter alia had observd that :

> " The question whether a court can deal with such matters or not (whether an appeal abates) will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to have all the necessary parties for the decision of the controversy before the court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent, (b) when the appellant could not have brought the action for the necessary reliefs against those

> respondents alone who are still before the court and (c) when the decree against the surviving respondents, if the appeal succeeds, will be ineffective, that is to say, it could not be successfully executed."

The Supreme Court, inter alia, also referred to the provisions of Order 1, Rule 9 of the Code which read as under :

> " No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." It follows, therefore, that if the Court can deal with a matter in controversy so far as regards the rights and interests of the appellants and the respondents, it has to proceed with the appeal and decide it. It is only when it is not possible for the Court to deal with such matters that it will have to refuse to proceed further with the appeal and therefore dismiss it".

28. In my view, in this case the son and daughter-in-law of the deceased defendant No. 1 were joined in this appeal as proforma respondents. They might have been at the most proper parties and certainly were not necessary parties for deciding the appeal. This appeal was filed by the remaining defendants No. 2 to 4. The case at hand is on all fours with the facts of the case of **Mahabir Prasad** v/s **Jage Ram and others** (AIR 1971 SC 742), and which has been relied upon in the case of **Chandramohan Ramchandra Patil and others** v/s **Bapu Koyappa Patil (dead) through L.Rs. and others** (supra). In the case at hand with the aid of provisions of Order 41, Rule 4 read with Order 41, Rule 33, it is possible to reverse the decree in its entirety notwithstanding the fact that original defendants 1(a) & (b)

were not served in the present appeal and their names were subsequently deleted. I am therefore, inclined to follow the last word of the law on the subject as laid down by the Supreme Court in the case of **Chandramohan Ramchandra Patil and others** v/s **Bapu Koyappa Patil (dead) through L.Rs. And others** (supra) and hold that the appeal need not be rejected because there would be inconsistent decrees. In case these appellants/defendants succeed, then the entire decree itself can be set aside. The objection of the plaintiff, therefore, fails.

29. Coming to the substantial questions of law raised, it is necessary to refer to certain provisions of the Act. Section 2 (22) defines the term “tenancy” to mean the relationship of landlord and tenant. Sub-section 23 of section 2 defines the word “tenant” to mean a person who on or after the date of commencement of this Act holds land on lease and cultivates it personally and includes a person who is or was deemed to be a tenant under this Act. Section 7 of the Act provides that if any question arises whether any person is a tenant or was a tenant or should be deemed to be a tenant under this Act, the Mamlatdar shall, after an inquiry, decide such question. In any such enquiry, the Mamlatdar shall presume that any statement as to the existence of a right of tenancy in a record of rights prepared in the prescribed manner under and in accordance with the provisions of this Act, is true. Section 7A of the Act provides that if any question arises as to whether any land is or is not used for agricultural

purposes the Mamlatdar shall, after holding an inquiry, decide such question. Section 58 creates a bar regarding the jurisdiction of Courts and provides that no suit or other proceeding shall lie against any person in respect of anything which is in good faith done or intended to be done under this Act. Sub-section 2 of section 58 states that save as provided in this Act, no Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the Mamlatdar, Tribunal, Collector or Government, and no order passed by these authorities under this Act shall be questioned in any Civil or Criminal Court.

30. Shri Lotlikar, the Learned Senior Counsel has submitted that the defendants had raised the issue of tenancy which was framed by the Learned Trial Court and having framed the said issue the same ought to have been referred to the Mamlatdar for his decision and in any event the Trial Court atleast ought to have directed the defendants to obtain such a declaration before having proceeded with the trial of the suit. Learned Advocate Shri Diniz, on the otherhand, submits that an issue of tenancy cannot arise in the absence of pleadings disclosing material facts constituting the plea of tenancy. Shri Diniz has also submitted that documentary evidence such as revenue record, rent receipts, etc. were not given to show prima facie that the defendants were cultivating the land as tenants. It has also been submitted by Shri Diniz that there was only a bald assertion of

tenancy and therefore on mere assertion no issue of tenancy could have been framed and referred.. Shri Diniz has placed reliance on some decided cases.

31. In the case of **Ramu Shivappa Agalgave and others** v/s **Imam Kashim Pathan and others,** 1992(3) Bom.C.R. 560, a Division Bench of this Court stated that :

> " Framing of an issue has got to be by an application of judicial mind and is not a mere mechanical exercise and that issue cannot be raised when the request on that behalf is made and is found to be frivolous and dilatory."

32. In the case of **Thomas Antony** v/s **Varkey Varkey,** (2000) 1 SCC 35, the Supreme Court referred to the case of **Sankaranarayanan Potti** v/s **K. Sreedevi,** (1998) 3 SCC 751 and stated that :

> " The said decision did not take an extreme position that the civil court had no other alternative than to refer the question if a party has raised the contention that if he is a tenant or a kudikidappukaran."

Referring to section 125(3) of the Kerala Land Reforms Act, 1963, the Supreme Court stated that :

> " The word "arises" was not a point which arose for consideration in the said decision and there was nothing in that decision to suggest anything contrary to the legal position adumbrated above and therefore the civil court was not obliged to make a reference to the Land Tribunal as per section 125(3) of the Act merely because a party had raised a contention that he is a tenant or a kudikidappukaran and the civil court had power to consider whether such contention had been raised without any legal foundation

> or with only the intention to gain time by protracting the litigation. If the civil court is of the opinion that there is not even a remote possiblity of the plea being upheld, the court can proceed to dispose of the suit without to the circumlocuted route via the Land Tribunal."

33. In the case of **Uttam Sambha Deshmukh and others** v/s **Yamunabai w/o Chandrabhan Bhoyar and others,** 1998(4) Bom.C.R. 441, this Court held that :

> " In the absence of material facts or evidence as to occupancy of land as a tenant or mere averment in the written statement is not enough and the Court was justified in not framing an issue on it and or refer to Tenancy Court."

34. In the case of P**ulmati Shyamlal Mishra and another** v/s **Ramkrishna Gangaprasad Bajpai and others,** 1981 Maharashtra Law Journal 321, this Court held that :

> " With reference to section 85-A of the Bombay Tenancy and Agricultural Lands Act, 1948 that the Civil Court was not under any obligation to frame and remit an issue of tenancy mechanically merely on the same being raised in the written statement, without judicial satisfaction of its necessity and justification. Cases can be conceived when tenancy plea may appear to be patently frivolous, fraudulent and part of the dilatory strategy, and may not by itself attract sections 85 and 85-A of the aforesaid Act."

This Court further observed that :

> " The process contemplated under Order 14 does not contemplate any trial of such issue but it does involve nipping of any such plea in the bud, if the Court, subject to any contrary decision in appeal and revision, judicially

> concludes against its framing and raising. This is implicit in the separate provision for framing issues and the trial thereof. This process does not thus involve any conflict between Order 14 of the Code of Civil Procedure or sections 85 and 85-A of the Tenancy Act nor any question of any lack or excess of jurisdiction. Such scrupulous compliance with these provisions alone can prevent such possible abuse of its process. The Court has thus a duty to examine the substance and refuse to frame and remit any such issue if the same appears to be demonstrably frivolous and malafide."

35. In the case of **Shri Manoj A.S. Dhargalkar alia Kulkarni and another** v/s **Smt. Taramati Harichandra Salgaonkar (since deceased) represented by her heirs and legal representative and others**, 2000(2) Goa L.T. 15, this Court stated that :

> " The person to be a tenant in relation to any property has necessarily to be in possession of the property of which the tenancy is claimed. In otherwords, the possession of the property is one of the necessary ingredients of the definition of the expression "tenant". Therefore a person claiming to be a tenant in respect of a property is necessarily required to establish the possession of such property with him. Naturally therefore, if a person claiming to be a tenant in respect of the property fails to prove his claim of tenancy, it will have to be concluded that he has failed to establish his possession in the capacity as the tenant in respect of the property of which the tenancy is claimed."

36. In the case of **Ms. Telma de Souza Gonsalves** v/s **Mr. Dashrat Shantaram Gadekar and others**, 1998(1) Goa L.T. 429, this Court held that :

> " The plaintiff has come with a specific case that the encroachments / structures were made in the year 1990 as stated in the plaint and the Civil Court is required to give decision on the said contentions of the petitioner. In case the defendants are occupying the said structures for 30 years as contended by them, they can certainly lead evidence to prove that the said encroachments/structures are being occupied by them for the said period and evidence in rebuttal can be led. It is not necessary at all, in the controversy raised by the petitioner, to decide the capacity in which the defendants are occupying the suit structure and in case the defendants so desire, they can independently resort to the remedy available to them in order to assert their capacity in which they are occupying the suit structures/encroachments. For the purpose of this suit it is not necessary to decide the said capacity. The petitioner's case would succeed or fail on the averments made in the plaint and the defendants can certainly lead rebuttal evidence to disprove the same."

37. In the case of **Lia Liberta Atanasia Lopes Costa and Another** v/s **Molu Anta Kalangutkar**, unreported decision of this Court dated 25.03.1998 in Second Appeal No. 34/1995, the plaint was ordered to be returned for the purpose of presentation of the same before the Court of Mamlatdar having jurisdiction in the matter in order to decide the question of tenancy.

38. In my view, the fact situation and the legal background in this case is entirely different than the fact situations in the cases cited hereinabove. It is well said that observations of Courts are not to be read as Euclid's theorems nor as provisions of a statute.

39. Admittedly, the defendants having taken the plea of tenancy an issue was framed whether the Civil Court had jurisdiction to decide the same. At no stage the plaintiff chose to get the said issue deleted in case it did not arise from the pleadings. In para 3, the defendants had specifically pleaded that the Court had no jurisdiction as they were tenants in respect of the suit property and had consequently become deemed owners of the same. In para 8, the defendants had referred to the lease agreement granted in their favour by the said Manuel Jose Francisco and had further stated that the said lease agreement dated 28.11.1951 was not terminated and that they were in possession and enjoyment of the said property to the exclusion of the plaintiff and his wife who were owners of the same. In the light of the pleadings of the defendants and the said lease agreement, the said plea taken by them could not have been said to be vague or frivolous and could have been prima facie accepted and in fact was accepted by the Learned Trial Court. However, what the Learned Trial Court did was to give a finding on the said plea of the defendants which was subject matter of issue No. 3. Once the said plea was taken and it could not be said that prima facie the same was frivolous, the same had to be necessarily decided by the Mamlatdar who has been given exclusive jurisdiction to decide the same. Whether the defendants were in fact in possession of the suit property or whether the defendants cultivated the land personally and as such were in possession of the same or whether the land was used for agricultural purposes were all matters which were required

to be decided by the Mamlatdar, the same being incidents or attributes of the tenancy claimed by the defendants and could not have been decided by the Civil Court.

40. The defendants having taken a plea that they were tenants which plea was prima facie substantiated and the Civil Court having framed an issue of jurisdiction in the light of the said plea, and the plaintiff having not taken any steps to get the said issue deleted in course of the trial of the suit or at anytime thereafter, in my view, there was no other option to the Learned Trial Court than to direct the defendants to obtain a declaration from the Mamlatdar in respect of the plea of tenancy taken by the defendants, for in case the defendants succeeded in the said plea all that the Plaintiff would be entitled to was only to receive the purchase price of the land of which the defendants would be the tenants. The Learned Trial Court could not have decided the issue of tenancy as has been done by the Learned Trial Court in this case as the jurisdiction to decide the same has been exclusively given to the Mamlatdar by virtue of provisions of the Act referred to herein above. Consequently, both the questions have got to be answered in the affirmative and in the favour of the defendants. The Judgments/Decrees of both the Courts below, therefore, deserve to be set aside. The defendants are hereby directed to obtain a declaration of tenancy claimed by them in respect of the suit property from the Mamlatdar and only thereafter the Learned Trial Judge will be in a position to proceed with the suit

in accordance with law and in the light of the findings to be given by the Mamlatdar. The defendants to file an application for declaration within a period of 60 days from today. The Second Appeal is allowed on the above terms. Considering the facts there will be no order as to costs.

N. A. BRITTO, J.

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